Matter of Partman v New York State Div. of Hous. & Community Renewal
2018 NY Slip Op 32277(U)
September 14, 2018
Supreme Court, New York County
Docket Number: 158766/2017
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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In the Matter of the Application of
HOWARD PARTMAN, individually and as representative of the 210 East 68th STREET TENANTS ASSOCIATION,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and BLDG MANAGEMENT CO., INC.,

Respondents.

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Index No. 158766/2017
Motion Seq: 001

DECISION, ORDER & JUDGMENT

ARLENE P. BLUTH, JSC

The petition to reverse a determination by respondent New York State Division of Housing and Community Renewal ("DHCR") is granted.

Background

This proceeding arises out of petitioner's tenancy in a building owned by respondent BLDG Management Co., Inc. ("BLDG"). In March 2009, BLDG filed an application to increase the maximum legal regulated rent after upgrading the elevator, a Major Capital Improvement ("MCI") increase. Tenants in the building opposed the application and pointed to two Class C violations issued by the Department of Housing Preservation and Development ("HPD").

On October 21, 2011, two and a half years after BLDG filed the application, the Rent Administrator ("RA") rejected BLDG's application and found that "Owner/Applicant failed to respond and submit information/evidence required for the processing of this application . . . in

notices dated 10/8/09, 9/22/10, 8/25/11. Other: Owner was requested to have the "C" lead based paint violation cured and removed from the HPD database. To date, the "C" lead based paint violation continued to exist on the HPD database. Accordingly, the MCI is denied" (NYSCEF Doc. No. 5).

On August 3, 2017, nearly six years after the RA's decision,, DHCR granted BLDG's petition for administrative review ("PAR") and permitted rent increases as of February 1, 2013– the first rent payment date in which BLDG could show the lead paint violation was removed (NYSCEF Doc. No. 4). February 2013 was also a year and a half after the RA's decision. DHCR observed that the "the owner attached a copy of an HPD printout showing that all outstanding violations had been removed from the HPD database as of January 2, 2013. The Commissioner having reviewed the petitioner's appeal and any and all supporting documentation . . . finds that the petitioner's appeal should be granted, subject to the conditions below" (*id.*).

"The owner's claim that the MCI rent increase should have been granted even though there were outstanding C violations on record for the premises is without merit. Pursuant to the Rent Stabilization Code provisions and long-standing DHCR policy which were in effect at the time this proceeding was before the Administrator, an MCI rent increase was not to be granted where there were immediately hazardous violations on record for the premises which were raised by the tenants in response to the application. When the violation(s) were for lead paint hazards, it had been long-standing policy that an MCI would not be granted unless such violation(s) had actually been removed from the HPD database. The fact that the owner may have been in the process of clearing the lead paint violations did not satisfy the requirement that such violations had to be removed from the HPD database in order for an MCI to be granted" (*id.*).

"[T]he owner was on notice, even prior to filing the MCI application, that the MCI would not be granted when there were outstanding Class C violations showing in the HPD database which were raised by the tenants in response to the application. Further, the record of the current proceeding shows that, prior to issuing the order denying the MCI, the Administrator provided the owner with ample opportunity, amounting to two full years time to clear the C violations from the HPD database, yet the owner failed to do so" (*id.*).

Petitioner claims that DHCR's order was arbitrary because it cited no error in the RA's October 2011 decision or any justification for allowing the MCI increase based on clearing violations years after the initial MCI application and after the RA's decision.

In opposition, DHCR stresses that BLDG informed DHCR in September 2011 that it was having trouble gaining access to the apartments to clear the lead paint violations. DHCR claims that the RA's decision was erroneous and observes that BLDG requested an extension of time to clear the lead paint violations in September 2011, a request that went unanswered. DHCR insists it was rational to permit an MCI increase effective from the date violations were removed from HPD's database.

DHCR points out that the version of RSC § 2522.4(a)(13) in effect at the time of BLDG's application prohibited DHCR from granting an owner's application for a rental adjustment if there were immediately hazardous (Class C) violations but also allowed DHCR to issue a conditional approval (the RA in this case did not issue a conditional approval). According to DHCR, this provision was amended in 2014 to require that violations need to be cleared as of the date of an owner's application and to permit an owner to refile an application (that is, no conditional approvals).

BLDG claims that the RA's order was improper because it did not grant BLDG the opportunity to refile within 60 days and this error forced BLDG to file a PAR demonstrating that it had cleared the lead paint violations.

Discussion

"In reviewing an administrative agency determination, we must ascertain whether there is a rational basis for the action in question or whether it is arbitrary or capricious" (*Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149, 753 NYS2d 1 [2002]). At the PAR, "the scope of review was limited to facts or evidence before the Rent Administrator" (*Marisol Realty Corp. v New York State Div. of Hous. and Community Renewal*, 154 AD3d 463, 464, 62 NYS2d 331 [1st Dept 2017]; *see also* RSC § 2529.6 [Scope of Review Regulation]).

The central question is whether DHCR's decision reversing the RA's initial denial was rational. The Court finds that DHCR's decision was arbitrary and capricious because it provided no basis for considering BLDG's actions to clear the violations, which were completed after the RA issued its decision. In fact, DHCR's opinion provides many reasons for why the RA's decision was correct– the decision concludes that BLDG had "ample opportunity" to clear the violations while the MCI application was pending before the RA and BLDG did nothing. DHCR's decision also makes clear that BLDG had notice that its MCI application would not be granted if there were Class C violations.

After detailing all the reasons why the RA was correct, DHCR grants an MCI increase because the outstanding C violations were cleared. But there is no mention of *DHCR's own argument that BLDG did nothing for two years or that BLDG had notice of DHCR's "long-standing policy" not to grant MCI increases where Class C violations exist.* There is no

discussion about BLDG's purported struggle to gain access to certain apartments or that the RA failed to consider BLDG's request for an extension to clear the violations.

Instead, after making clear that the RA was correct in denying the increase, DHCR granted the PAR because the violations were cleared as of January 2, 2013 (almost four years after the initial MCI application and almost a year and a half after the RA's decision). No authority or reason is cited to justify considering information that was not before the RA. This is not a case where the newly-submitted evidence shows that the violations were issued in error or the evidence was only discovered after the RA issued a decision. The fact is that according to DHCR, BLDG knew that it needed to remedy the violations to get an MCI increase and it did not do so before the RA issued a decision. While the violations were eventually cleared, this Court cannot simply ignore the lack of analysis provided by DHCR.

BLDG's claim that the RA should have given it leave to refile an MCI application once the violations were cleared is beyond the scope of this proceeding because DHCR did not address that point. DHCR could have remanded the proceeding to the RA on the grounds that the violations were purportedly cleared, the RA failed to appreciate BLDG's struggle to get access to certain apartments and that BLDG did respond to the RA's requests for information. But DHCR's decision did not do that. It did not make any findings that could justify BLDG's delay in remedying violations or to reverse the RA's decision. Again, as stated above, DHCR's decision excoriates BLDG for not moving fast enough to remedy the violations and insists that BLDG had notice of DHCR's policy to not grant an MCI application where Class C violations exist.

Summary

DHCR's conclusion is simply not supported by its own analysis. No one disputes that there were immediately hazardous violations and that BLDG failed to clear these violations until well after the RA issued its decision. DHCR provides many reasons for why the RA was correct but then reverses the RA based on evidence not before the RA – without giving any justification for why it considered evidence that did not even exist when the RA made the decision. That is simply not rational.

While the ultimate outcome (granting an MCI increase effective after the violations were cleared) would have made sense as the *RA's* ruling, that was not the RA's decision. It might have even been rational if the DHCR remanded the case back to the RA on a finding that BLDG did not know it had to respond to the RA's requests, but the DHCR did not. Instead, the DHCR's decision is not supported by any binding authority or its even own analysis. The Court recognizes that there may have been difficulty getting access to certain apartments but that does not explain why it took BLDG nearly four years to clear the violations from the time it initially filed the application in 2009.

Instead, the DHCR's decision granting BLDG an MCI increase here effectively nullified the rule that MCI applications must be filed within two years of installation. Given that (at the time this application was filed) these increases were not granted if Class C violations existed, BLDG should have known that it needed to clear the violations in order to receive the MCI increase.

By its decision, based upon events not in existence when the RA's decision was rendered, DHCR has allowed BLDG the right to do an MCI, file an application for an MCI increase and then clear immediately hazardous violations on its own schedule. That makes no sense.

Accordingly, it is hereby

ADJUDGED that the petition is granted with costs and disbursements to petitioner as taxed by the Clerk upon presentation of proper papers and petitioner shall have execution therefor.

Dated: September 14, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH